No. 185

Office - Supreme Court, U.
FILED
AUG 20 1949
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UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

In the Matter of
THE ELLESS COMPANY, a Michigan corporation,
Debtor

FRANK W. BLAIR, LOUIS H. CHARBONNEAU, and LUCIUS TETER, Trustees under Trust Agreement for Stock of Whittier Corporation dated as of May 1, 1938, and WHITTIER CORPORATION and HARRY W. JONES and HAROLD M. SHAPERO,

Petitioners,

vs.

JOHN C. FINAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE INLAND PRESS

Index to Authorities Cited

	PAGE
In re Ambassador Hotel Corporation, 124 Fed. (2d) 435	8
In re Chicago and Northwestern Railway Company, 35 Fed. Supp. 230	13
In re Flatbush Avenue-Nevin Street Corporation, 133 Fed. (2d) 760	8
In re President Realty Company, 67 Fed. Supp. 390	13
North American Car Corporation v. Peerless Corporation, 143 Fed. (2d) 938	8, 11
Reese v. Beacon Hotel Corporation, 149 Fed. (2d) 610	8
Tower Hotel Corporation v. Lafayette National Bank, 148 Fed. (2d) 145	8
United States v. Columbia Gas and Electric Corporation, 27 Fed. Supp. 116	12

Statutes Cited

	PAGE
Sec. 32 Michigan Corporation Code (page 15 of Petition)	2
Sec. 34 Michigan Corporation Code (page 16 of Petition)	2, 4, 11

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John C. Finan, respondent in the above cause, files this brief in reply to petition for Writ of Certiorari and brief in support thereof.

PETITION FOR WRIT OF CERTIORARI

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

(A) Opinion of Court of Appeal

In this paragraph petitioners state that the opinion of the Court of Appeals held at the District Court had jurisdiction to terminate the voting trust created under the plan of reorganization and *to determine the rights of the voting trustees* and *voting trust certificate holders to vote the stock represented by said certificates distributed in 1938;* and that the District Judge should have enjoined the trustees from voting the trust stock *even though it was voluntarily left by the certificate holders with the trustees, notwithstanding section 32 and 34 of The Michigan Corporation Code* and also that *such power and determination of the rights of the certificate holders* could be adjudicated and determined in a proceeding in which said certificate holders were not parties, without violating the due process cause of the Federal Constitution.

There is nothing either in the opinion of the District Court (175-178) or in the opinion of The Circuit Court of Appeals (226-233) which determines or in any way attempts to determine the right of the certificate holders to vote their stock and the above italicized portions of petitioners' statement of the matter involved are not accurate statements. It is true that Section 32 of the Corporation Code of the State of Michigan (pages 15-16 of petition) permits the closing of the corporate books not more than forty days prior to a stockholders meeting and provides

that only stockholders of record on the closing date shall have the right to vote the stock at such meeting. It is also true that the stock which was being held by the stock trustees under the voting trust in the present case was registered in the name of the trustees and under The Michigan Corporation Law could not be voted by the holders of trust certificates until said certificate holders had first withdrawn their stock from the trust. However they have had the right to do this since May 1st of 1942 (130) and no certificate holder was deprived of the right to vote his stock by the opinion of either the District Court or the Circuit Court of Appeals inasmuch as he at all times had the right to remove his stock from the trust and vote it in his own name. Therefore neither directly or indirectly was the right of any certificate holder to vote his stock determined by the opinion of the court from which petitioners seek the right of appeal.

With reference to petitioners' statement that the opinion of the court of appeals held that the District Court had the right to determine the rights of certificate holders in a proceeding in which they were not parties without violating the due process cause of the Federal Constitution; first there is no determination of the certificaite holders' rights and second that a complete copy of the original petition filed in the District Court by John C. Finan (respondent herein) (99-121) together with a notice of hearing was ordered to be (136) and was served on all certificate holders (138) more than thirty days prior to the hearing thereon and this notice contained adequate notice of the matter to be determined by the court (137). So that all certificate holders were fully advised of the nature of the proceedings pending before the district court and given an opportunity to appear if they so desired.

As to petitioners' statement that the court of appeals has so far departed from the usual course of judicial proceedings by determining the rights of voting trust certificate holders to voluntarily permit voting trustees to continue to vote their stock after termination of the trust as provided in Section 34 of The Michigan Corporation Code (page 16 of petition); the court's opinion does not deal with the rights of the certificate holders—it only determines the rights of the trustees. This is not the usual private voting trust between individuals but is a judicial trust set up by the court and operated by judicial trustees appointed by the court to accomplish a specific purpose. (43)

The provisions of the Michigan Corporation Code referred to by petitioners reads as follows (page 17 of petition):

> "* * * and thereupon said transferee or transferees *may* vote upon the shares so transfered during the period in such agreement specified and thereafter until those entitled to receive certificates of stock under such agreement shall have received the same."

It is evident from the use of the permissive word "may" that there is nothing in the above quoted provision or in the Michigan Corporation Law which in any way deprives or attempts to deprive the court of its inherent power over its own trust or its right to terminate it and discharge its trustees when the purposes for which the trust was established have been performed. It was admitted by the petitioners herein in their answer to respondent's petition (101-2) (123) and in their argument before the trial court (214-15) that the corporation was out of all financial difficulty and fully re-habilitated and paying dividends so that the purposes of the reorganization had been

fully carried out on April 1st 1946, the expiration of the original trust agreement and also at the time of the hearing and both the trial court (176-7) and the court of apppeals (231) so found.

(B) Relationship of Parties

Under this paragraph petitioners state that:

> "It is the right of voting trust certificate holders to continue to leave their stock with the trustees which is involved in this litigation."

This is the same principle as discussed in the preceding paragraph. The court has not decided what the certificate holders may do with their stock. It has only decided that the court's trustees have no authority to vote it.

(C) The Voting Trust Agreement and Extension Thereof

In addition to the provisions mentioned by petitioners as being here important, the agreement also contained the following provisions: (a) that the trustees should have the right to vote the trust stock until they have disposed of it pursuant to the provisions of the agreement (59-60) and (b) that upon termination of the trust the trustees shall within 30 days thereafter deposit with the depository named in the agreement, all trust assets in their possession, including stock certificates representing all shares evidenced by outstanding trust certificates *and that upon such deposit the trustees' liability to deliver stock certificates upon surrender of trust certificates shall cease and the trustees shall not be required to take any further action of any nature thereunder.* (68-9) The purported amendment to the trust agreement made no change in these provisions. (89-96)

Respondent contended that the purported amendment was void and ineffective for four reasons:

(a) Because it was in violation of the Corporation Code of Michigan prohibiting voting trusts for a term of more than ten years (106)

(b) Because the Whittier Corporation had no power to execute it (100-1) (106)

(c) Because the District Court had no jurisdiction to approve the amendment inasmuch as all purposes of the reorganization plan had been completely carried out (101-2) (106) and

(d) Because whatever approval by the certificate holders of the amendment that was obtained by the endorsement on their certificates of the legend provided in the amendment, was obtained by misrepresentation and fraud and therefore was void. (104-6)

(D) Proceedings in District Court

The district court although it apparently was of the opinion that the order approving the amendment was void (216), saw fit to exercise the authority granted it in the original agreement (68) and the amendment (94) to terminate the trust without deciding the question of the jurisdiction of the court to enter the order approving the amendment (177). The district court also refused respondent's request to discharge the trustees and enjoin them from voting the trust stock although they then claimed the right to do so after the trust had been terminated (196-8).

(E) Proceedings in Court of Appeals

The court of appeals held that the order extending the voting trust agreement was beyond the jurisdiction of the court for two reasons: first, because it was not necessary for the protection of the original order confirming the plan of reorganization or to prevent interference with its execution and second, because it was in violation of the Michigan Corporation Law limiting the term of voting trust to ten years (230). It affirmed the order of the District Court terminating the trust (231) and held that the final order of the District Court should have included a provision, in accordance with respondent's request, discharging the trustees and enjoining them from further voting the stock in the trust (233).

Petitioners have presented no practical reasons for the continuation of their right to vote the trust stock other than their desire to do so and that they believe it is the only way in which owners of small amounts of stock in the trust can be adequately protected (230).

ARGUMENT

Petitioners in their brief contend:

I. That the District Court had no power to terminate the trust.

II. That even though the District Court had the power to terminate the trust the court of appeals had no power to order the trustees enjoined from further voting the stock in the trust.

III. That the action of the District Court terminating the trust was taken without notice to interested parties and therefore in violation of the Fifth Amendment of the Constitution of the United States.

We will discuss these questions in order:

I. That the District Court had no power to terminate the trust.

Petitioners argue that the District Court had no jurisdiction to terminate the voting trust nine years after the order confirming the plan of reorganization had been entered and the plan put into effect and that this decision is in conflict with the decisions of the Court of Appeals of the Second Circuit and cites the cases of In re Ambassador Hotel Corporation, 124 Fed. 2nd 435; Reese v. Bacon Hotel Corporation, 129 F. 2d 610; Towers Hotel Corporation v. Lafayette National Bank, 148 F. 2nd 145; In re Flatbush Avenue-Nevins Street Corporation, 133 F. 2nd 760, and North American Can Corporation v. Peerless Corporation, 143 F. 2nd 938, in support of this con-

tention. We agree that the rule laid down in these cases is the correct rule as to the extent that reserved jurisdiction may be exercised in such cases. This rule is briefly and we think correctly stated by the Court in Towers Hotel Corporation v. Lafayette National Bank (supra) on page 148 as follows:

> "The court may only retain jurisdiction to protect its decree to prevent interference with the execution of the plan and to aid otherwise in its execution."

The order of the Court entered April 12, 1938, approving the plan of reorganization specifically reserved jurisdiction over the stock trust and over the trustees (47) as well as jurisdiction to enter such further orders as may be necessary in carrying out the terms and provisions of the plan (47). This reservation of jurisdiction, of course, is limited by the above rule to what is necessary to prevent interference with and aid in the execution of the plan of reorganization. The trust agreement was a part of the plan of reorganization and the original agreement (68) as well as the extension thereto (94) contained a provision granting power to the court to terminate the trust.

The court's order of termination was clearly within the authority expressed in the agreement if it was an order made for the purpose of effectuating the plan or preventing interference therewith. The plan was adopted, the voting trust set up and the voting trustees appointed by the court all for one purpose, namely, to relieve the debtor of its pressing obligations, reduce its indebtedness to an amount that would permit it to operate as a solvent concern and then leave it free of all supervision of the court.

That this purpose had been fully accomplished is admitted in appellant's answer to appellee's petition (101-2) (123) and was so determined by the trial court (176-7) and the Court of Appeals (231).

The voting trustees are officers of the court and their supervision and control over the Whittier Corporation by the exercise of their right as trustees to elect the directors and officers of the corporation is the supervision and control by the court. They have not only elected themselves directors, but also the principal officers of the corporation as is shown by their signatures appearing on the purported extension agreement (96) answer to appellee's petition (134) and by the letter of Harold M. Shapero (167).

It is as much the province of the court to terminate its own trust when its purposes have been served as it is to establish it in the beginning, and to hold that the court has no authority to put an end to the present trust is paramount to holding that its supervision and control over the Whittier Corporation must continue indefinitely at the will of the appointed trustees so long as any substantial number of the certificate holders have not exercised their right to withdraw their stock and vote it in an annual meeting of the corporation against such control.

We think the court not only had the authority to terminate the trust under the provisions thereof, but that it was also its duty to do so.

II. That even though the District Court had the power to terminate the trust, the Court of Appeals had no power to order the trustees enjoined from further voting the stock in the trust.

Under this section of their brief petitioners argue in effect that inasmuch as Section 34 of the Michigan Corporation Code permits voting trustees to continue to vote trust stock after the expiration of the trust until it is removed by the equitable owners thereof (in this case the certificate holders) that the petitioners have a statutory vested right to continue to vote stock that has not been removed until the last share has been taken out by the certificate holders.

If this were a private voting trust, not under court supervision and the trust agreement contained no provisions as to the termination of the rights of the trustees it is possible that such a construction as advanced by petitioners might be put on this statute although we think even that would be doubtful. However this trust was established by the order of the court confirming the plan of reorganization and the original trustees, two of whom are petitioners herein, were appointed by the court in that order (43) and the appointment of the third petitioner trustee was approved by order of the court (124). It was established as part of the plan of reorganization for a specific purpose, viz.: to assist in rehabilitating the business of the reorganized corporation and start it off on a new to-be-hoped-for more successful career (In re North American Car Corporation v. Peerless W. & V. Mac. Corporation, 143 F. 2nd 938, 940) and it was never intended to continue beyond the period necessary to accomplish this specific purpose. Jurisdiction was reserved in the order of confirmation (47)

> "over the trustees from time to time acting as trustees under said trust agreement for the purpose of supervising the acts and doings of such trustees and appointing and removing them."

The trust agreement taking up 40 pages in the record (48-77) specifically defines the rights and duties of the trustees and provides that they shall have the right to vote the trust stock "Until they shall have disposed of it pursuant to the provisions of the agreement" (59-60). The agreement also provides that within 30 days after termination thereof the trustees shall deposit with the depository of the corporation (68-9):

> "All assets then in their possession, including, specifically, cash, Stock certificates representing the number of Stock Certificates representing the number of shares of Capital Stock evidenced by Trust Certificates then outstanding"

and also that (69):

> "Upon such deposit all further liability of the Trustees or any of them for the delivery or payment of such stock certificates or proceeds or dividends or other assets shall cease and determine and The Trustees shall not be required to take any further action of any nature hereunder."

Petitioners also argue that the trustees are not officers of or under the jurisdiction of the court and they cite in support of this position the case of United States v. Columbia Gas and Electric Corporation, 27 Fed. Supp. 116. The facts connected with custodian Dunn are not clearly stated in the opinion in this case; but evidently he was not a trustee appointed by the court to execute a trust set up by the court.

They also cite In re Chicago and Northwestern Railway Company, 35 Fed. Supp. 230, in which there was no appointment of trustees by the court, and In re President Realty Company, 67 Fed. Supp. 390, which only held that the reserved jurisdiction of the court was not broad enough to permit the court to alter the terms of the trust.

These cases clearly do not apply to the present controversy of whether the court can discharge its own trustees after the termination of the trust.

III. That the Action of the District Court terminating the trust was taken without notice to interested parties and therefore in Violation of the Fifth Amendment to the Constitution of the United States.

Petitioners under this section of their brief argue that interested parties were deprived of their property without due process of law by the entry of the order of the District Court terminating the trust, without due notice having been given to trustees, certificate holders or anyone else.

The trustees and petitioners, Jones and Shapiro, who were certificate holders, were all represented at all hearings in court by counsel and all other certificate holders were served (138) with a copy of respondent's original petition (99) together with a notice of hearing (137) more than 30 days before the hearing and this notice of hearing contained the following paragraph (137):

> "The question involved is whether the voting trustees shall continue to vote in stockholders' meetings of the Whittier Corporation, all stock which is represented by the outstanding trust cer-

tificates, of which your certificate is one, or whether corporation stock of the Whittier Corporation shall be issued to the certificate holders, so that all those now holding trust certificates will hold and vote their own stock (either in person or by proxy) as they see fit."

We are unable to see where any interested parties were not given proper notice of the proceedings particularly inasmuch as nothing was involved except the termination of the trust and the right of the trustees to vote the trust stock.

CONCLUSION

We respectfully submit that the Writ of Certiorari should be denied.

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Dated August 13, 1949